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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1583

JIM L. NAPPER, ET UX.,

Petitioners,

v.

ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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September 5, 1975

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(1) Respondents now contend this case was already barred by limitations on August 23, 1971 when filed in the U.S. District Court for the Northern District of Texas (Rsp.Br.5,16). This contention (an affirmative defense; Rule 8(c), F.R.Civ.P.) arises for the first time in the Supreme Court. The Supreme Court has a policy against the consideration of claims not raised below. Cort v. Ash, ___U.S.___,95 S.Ct.2080,fn.6 (1975). If the contention is well taken,

Notation: Unless otherwise indicated, emphasis has been supplied by petitioners.

the District Court can easily enter a summary judgment upon remand.

(2) However, the contention is unfounded. Under principles well settled in Texas and most everywhere else, an attorney acts as a fiduciary, limitations does not begin to run until the cestui has been placed on notice of the breach of trust and the latter has no duty to exercise diligence in the discovery of a breach. Eastman v. Biggers, 434 S.W.2d 439(Tex.Civ.App.1968); Fiduciary Relations As Affecting Limitations, 45 A.L.R. 3d 630(1972). Petitioners were not unequivocally placed on inquiry until the lender Johnson refused to allow them to redeem their property. This occurred on August 26, 1969 (P.A.17) and this present suit brought on August 23, 1971 came within the following two years. However, respondents' attempt to impeach their affidavit of diversity (P.A. 1) filed September 2, 1971, came more than two years after redemption was refused.

(3) The claim of federal question jurisdiction is indirectly attacked as being filed "almost five years after the date of the alleged tort"(Rsp.Br.17). Of course, it was unnecessary for petitioners to present this claim until after their diversity claim came under fire. Inasmuch as suit was timely commenced, the relation back provisions of Rule 15(c), F.R.Civ.P. preclude a plea of limitations.

(4) Throughout their statement of the case and elsewhere, respondents have labored the diversity claim on its merits. However, both the District Court and the Fifth Circuit expressly refused to consider the merit of the diversity claim. Similarly, the Supreme Court has a policy against the con-

sideration of claims not reached in the Courts below. Cort v. Ash, supra. If respondents be correct that the ruling of the Arkansas Court is clearly sound, the District Court can quickly dispose of the diversity claim on remand. Obviously, the District Court below will examine the Arkansas ruling and will not cast it lightly aside. Respondents have nothing to fear from a reversal unless there is manifest error (or at least substantial doubt) in the Arkansas ruling.

(5) Petitioners will not lengthen these proceedings with a point by point response to the "no-diversity" argument. We consider that it is all misplaced. We do present that the record does not bear out the claims made and that petitioners' claims have been misconstrued and quoted out of context. For example, petitioners never contended that diversity had been "judicially admitted" (See Rsp.Br.8,fn.). Also, the homestead issue has been taken out of context. Petitioners neither admitted nor abandoned in various respects as urged; all as we will fully show when the case is remanded to the District Court.

(6) The contention that remand orders could be circumvented if § 68.1 is applied (Rsp.Br.13-14) will not stand up to analysis. Removals are by defendants, not by plaintiffs. When a federal court orders "this case"(P.A.2) remanded, there is no way for the defendant to"file the same suit in another federal court," as contended (Rsp.Br.14). We would also point to Professor Moore's suggestion that "there should be no obstacle to normal operation of the collateral estoppel doctrine" when both the

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prior and the present cases are non-appealable. Moore, Fed.Prac., ¶ 0.416[5],p.2301. However, the situation does not fit the case in bar for the dismissal order before this Court is expressly appealable.

(7) Respondents urge that petitioners "elected" to litigate diversity in Arkansas (Rsp.Br.2) and "knew" that a remand order would be non-appealable (Rsp.Br.14). The doctrine of election of remedies is admittedly harsh and falling under continuing disfavor, 25 Am.Jur.2d, Election,§3. Respondents could not contend with a straight face that petitioners themselves "knew" that the Arkansas ruling was non-appealable and further "knew" that the Texas Court would hold the Arkansas ruling to be conclusive. All the choice that petitioners had was Hobson's choice. What respondents are really trying to do is to endow the petitioners' lawyer with omniscience far beyond his actual capacities. Their willingness to compliment the plaintiffs' lawyer might possibly be actuated by self-serving motives. The facts are that petitioners' lawyer exhibited the same lack of skill and foresight as attorneys for the government in U.S. v. Munsingwear, 340 U.S.36(1950). We submit that the era of legal gamesmanship is (or should be) passing from the scene. In retrospect, petitioners' attorney knows that he should have advised the Arkansas Federal Court that he would not contest a remand order. The case would then have gone back to the state court by agreement and the diversity question would not have been litigated at all. The facts are that hindsight is perpetually sharper than foresight and for such a reason alone, the law should be free of traps for the unwary.

Petitioners have not been provided appellate review upon the merits of their diversity claim as Congress clearly contemplated. For such reason, certiorari should be granted and the case reversed.

(8) Petitioners strenuously deny that their plea of federal question jurisdiction is "admittedly unfounded" (Rsp.Br.2, 17). The distinction between Cort v. Ash, supra, and petitioners' leading case of Reitmeister v. Reitmeister, 162 F.2d 691(2-N.Y.1947), is immediately apparent. In Reitmeister, the statute was specifically enacted for the specific purpose of protecting the plaintiff from the specific harm complained of; the injury to the plaintiff was direct, immediate and substantial. Further, Congress must have found that state laws affording protection from fraud and deceit were inadequate, either in form or in enforcement or both. Otherwise, it follows that the wire fraud statute would never have been enacted at all. The case in hand is controlled by Reitmeister which was by no means overruled by Cort.

(9) We note that in Cort v. Ash, this Court refused to consider the pendent claims because they were not urged below. Id. at 2085,fn.6. Contrariwise, respondents concede that petitioners urged pendent jurisdiction in the District Court (Rsp.Br.9). Pendent jurisdiction was argued as Issue No. Four in the Fifth Circuit (Apt.Br.50-56). When the Court failed to discuss pendent jurisdiction, it was re-argued by petition for rehearing (Apt. Pet. Reh. 2-3). The Court erred on rehearing in holding that "there was never any basis of federal jurisdiction sufficient to support pendent

jurisdiction" (P.A.15).

(10) We suggest that a footnote in United Housing v. Foreman, ____U.S.____, 95 S.Ct.2051,2064(1975), is no authority for denial of the doctrine of pendent jurisdiction. Rather, it is an illustration of what happens when a party fails to do that which petitioners have done throughout. That is to say, we suspect that in United, pendent jurisdiction was never urged by the plaintiffs. Such omission caused this Court to slide into the easy assumption that the federal court had no jurisdictional basis for consideration of state law claims. We cannot know from the opinion whether or not pendent jurisdiction actually existed. The matter simply was not developed.

WHEREFORE, petitioners ask that a Writ of Certiorari be granted.

Respectfully submitted,

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